IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

First Appeal No. 333 of 1990
with
Civil Application No.4797 of 1990

Central Bank of India ..Appellant

Vs.

1. Syndicate Bank and ors. ..Respondents

Shri P.S.Dani swith Smt.Vidya Shreekumar and Shri Vipul Bilve i/b Mulla and Mulla and C.B.C. for appellant.

Shri Sanjiv Kanchan for Respondent no.1.

CORAM: S.B.MHASE J.
11th August,2006

ORAL JUDGMENT:

1. Heard the learned Counsel.

2. This appeal is directed against the judgment and decree passed in Special Civil Suit No.232 of 1985 by the Civil Judge, Sr.Dn., Thane on 31st March, 1989. The appellant is the original defendant no.5. Respondent no.1 is the original plaintiff while respondent nos.2, 3, 4 and 5 are the original defendant nos.1 to 4. The Special Civil Suit No.232 of 1985 was filed before the Civil Judge, Sr.Dn., Thane by respondent no.1 to recover the amount of loan and interest of Rs.8,66,586.73 and also for future interest at the rate of 18.5% p.a. from respondent nos.2 to 5. In

the said suit declaration was claimed that respondent no.1 has first charge on the hypothecated machinery and the goods owned by respondent nos. 2 to 5 since those goods and machinery were hypothecated to respondent no.1 Bank. In the said suit, the appellant was shown as defendant no.5 since it was found by respondent no.1 that the premises of respondent nos.2 to 5 where the hypothecated goods and machinery was located were locked by the appellant. It was found that the appellant had also advanced the loan as against the hypothecated goods and machinery. Therefore, in those circumstances, respondent no.1 claimed first charge on the hypothecated goods and machinery. So far as the appellant is concerned, the appellant is only interested in hypothecated goods and machinery. According to the appellant also the appellant has advanced the loan to M/s Usha Trading Company wherein respondent nos. 3 to 5 are the parties. It appears that it is a sister concern and/or a different company by the same directors. The fact, however, remains that the appellant has also obtained a decree as against Usha Trading Co. and respondent nos. 2 to 5 in Special Civil Suit No.287 of 1985 and thus according to the appellant the goods and machinery belong to Usha Trading Co. and, therefore, they have first charge on the said goods and machinery.

3. So far as the transaction of advancement of loan by respondent no.1 to respondent nos.2 to 5 is concerned, the appellant has no grievance. The appellant's grievance only is in respect of the goods and machinery which are hypothecated to them and the appellant's learned Counsel Shri Dani submitted that the Trial Court committed an error in holding that respondent no.1 has first charge on the said hypothecated goods and machinery. Therefore, the only grievance which is for consideration for this Court is as to whether the appellant is having first charge as against the goods and machinery of the respondents and/or the respondent no.1 is having the charge against the said goods and machinery. It is to be noted that the goods and machinery which is hypothecated with the appellant and respondent no.1 Bank is one and the same and both the appellant and respondent no.1 are claiming first charge on the said goods and machinery so as to recover their respective loans which they had advanced. What is to be noted that respondent nos.2, 4 and 5 have obtained the loan from respondent no.1 being partner of Usha Wire Ropes which is a registered partnership firm. So also respondent nos. 3, 4 and 5 have obtained a loan from the appellant in the name of Usha Trading Co. and for both the loan transactions respondent

nos.3, 4 and 5 have hypothecated the same goods and machinery. Thus, no comment is required to be made but for that respondent nos.3, 4 and 5 have played fraud against both the Banks. However, that will not reveal both the Banks from their liability.f However, in the facts and circumstances of the case this Court is called upon to find out who has advanced the loan first. In fact, the Bank who subsequently advanced the loan could not have made proper enquiries as to whether the goods which are being hypothecated are already hypothecated or pledged with any other Bank or not and, therefore, this Court is called upon to consider as to whether the advancement of loan by the appellant and the hypothecation of goods in favour of the appellant is first in point of time or not. The Trial Court has already held that it is respondent no.1 who has advanced the loan first in point of time and the goods were hypothecated with respondent no.1. It is pertinent to note that in this matter the appellant has not examined any witness in order to show when the loan was advanced by the appellant and the hypothecation of the goods was in favour of the appellant Bank. On the contrary it is revealed from the evidence of P.W.1 Dattatraya Kumbhar that on the request of respondent nos. 2 to 5 term loan of Rs.2,40,000/- was granted on 3rd January, 1981 and over draft facility of Rs.2,00,000/- was

further granted to him on 20th May, 1982. It is further stated that respondent nos. 2 to 5 executed the letter of request for financial assistance, then acknowledgement receipt for Rs.1,81,000 on 3rd January, 1981 and for Rs.23,360/- on the same day and memorandum agreement, deed of hypothecation, letter of delivery of machinery, letter of instalments, letter of acknowledgement of debt, promissory notes etc. were executed on the same date. It is further revealed that last payment received by respondent no.1 was of Rs.55,168/- on 5th December, 1981 and thereafter respondent nos.2 to 5 have failed to make payment and regularise the account. Therefore, on 8th July, 1985 on visit by the Manager it was found that the premises were locked by the appellant. When a request was made to the appellant, the appellant refused to remove the lock and placed the claim as against Usha Trading Co. Under these circumstances the suit came to be filed. It is further revealed from the testimony of P.W.2 that the cheque of Rs.1,81,00 was issued by the Bank to Unique Fabricators and another cheque of Rs.35,000/- was issued to Atlas Machine Tolls after the loan was sanctioned to respondent nos.2 to 5. The said witness has stated that the Bank has received the stamped receipt from both the Companies along with the invoice and subsequently

delivery of machinery to the defendants. He further stated that he visited the factory premises and verified and found the machinery installed as per the invoice. P.W.3 has stated that he had visited the factory premises on 8th July, 1982 and inspected the machinery and submitted the report to the head office. He found the machinery to be correct as per the invoice and he proved the report Exh.61. He has further stated that on 9th July, 1985 he last visited the factory premises and found the factory premises locked by the Central Bank of India and, therefore, further correspondence with the appellant has taken place and ultimately the suit has been filed. From the tenor of cross-examination of this witness by the appellant, it is seen that the only question which was asked is whether there is a practice of putting a notice or board after the goods being hypothecated with the Bank and that respondent no.1 has not placed any such notice. However, the said witness has not admitted that he has not put up a notice there. However, from this cross examination it becomes eloquently clear that the appellant had advanced the loan subsequently and the hypothecation and loan of respondent no.1 was first in point of time. Apart from this it would been better for the appellant to place on record the actual documents by which the loan was advanced and hypothecation

deed which was executed in favour of the appellant and further invoice of purchase of the machinery etc. so as to show that the loan was advanced by them in first in time and machinery was purchased out of the money which was advanced by respondent no.1. Unfortunately for the best reasons known to the appellant, the appellant has not preferred the said course though the opportunity was available for the appellant. Attempt has been made in this Court by filing civil application no.4797 of 1990 to produce the hypothecation deed which was executed in favour of the appellant. However, the said document cannot be taken on record and proved in absence of proof of document. Apart from that even looking to that document which was executed on 20th July, 1985 and that is subsequent to advancement of loan by respondent no.1 which was advanced by respondent no.1 in the year 1981. Thus the appellant being aware of the fact that there loan was subsequently advanced they have not made any efforts in the Trial Court to secure the same. Thus, this Court also finds and records the finding that the advancement of loan by respondent no.1 was first in point of time and goods were hypothecated with respondent no.1 first in point of time and, therefore, respondent no.1 is having first charge on the hypothecated property and, therefore, submission of the learned Counsel is hereby

rejected.

4. The last effort is made by the learned Counsel to demonstrate that the first charge of respondent no.1 may be restricted to the hypothecated goods as shown in their hypothecation deed and rest of the property may be declared as not hypothecated to respondent no.1. This aspect cannot be gone into at this stage. In fact, it will be open for the parties to show in execution as to what was hypothecated and what was not hypothecated. Therefore, that aspect of the matter is kept open for the parties to adjudicate before the appropriate forum. The appeal is thus without any merit and is hereby dismissed. Since both the banks nationalised banks costs in cause.

5. In view of dismissal of the first appeal civil application does not survive and hence rejected.

(S.B.MHASE J.)